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Supreme Court, U.S.
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No. 05-364

In The
Supreme Court of the United States

CORUS STAAL BV AND
CORUS STEEL USA INC.,

Petitioners,

v.

DEPARTMENT OF COMMERCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decision of the U.S. Court of Appeals for the Federal Circuit upholding the Department of Commerce's use of the so-called "zeroing" methodology is in conflict with the decision of a North American Free Trade Agreement ("NAFTA") Binational Panel and its reliance on certain World Trade Organization ("WTO") rulings regarding zeroing.

2. Whether the decision of the Federal Circuit is in conflict with the decisions of other circuits as to the role of *Charming Betsy* in cases involving *Chevron* deference to an agency's interpretation of an ambiguous statute.

3. Whether the Federal Circuit correctly accorded deference to Commerce's interpretation of the U.S. antidumping statute based on the foreign policy implications of its determination and given the statutory scheme established by Congress for the adoption of WTO decisions.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows: (1) the petitioners, Corus Staal BV and Corus Steel USA Inc. and (2) the respondents, the United States Department of Commerce and United States Steel Corporation.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent United States Steel Corporation does not have a parent company. In addition, no publicly held company owns 10% or more of United States Steel Corporation's stock.

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BRIEF OF RESPONDENT UNITED STATES STEEL CORPORATION IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Respondent United States Steel Corporation ("U.S. Steel") hereby submits this brief in opposition to the petition for a writ of certiorari filed by Petitioners Corus Staal BV and Corus Steel USA Inc. (collectively "Corus").

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit (Pet. App. 1a-10a) is reported at 395 F.3d 1343 (Fed. Cir. 2005). The order of the Federal Circuit denying the petition for rehearing and rehearing en banc (Pet. App. 61a-62a) is unreported.

The opinions of the U.S. Court of International Trade are reported at 283 F. Supp. 2d 1357 (Ct. Int'l Trade 2003) (Pet. App. 11a) and 259 F. Supp. 2d 1253 (Ct. Int'l Trade 2003) (Pet. App. 12a-46a).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit was entered on January 21, 2005. Corus' petition for rehearing and rehearing en banc was denied on May 18, 2005. On July 28, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 15, 2005, and Corus' petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Statutory Framework Relating to Determinations of Dumping

The U.S. trade laws provide remedies to domestic industries that have been harmed by unfairly traded imports. In particular, the Tariff Act of 1930, as amended (the "Act"), provides for the imposition of antidumping duties where a domestic industry has been injured or threatened with injury by imports of products sold at less than fair value (i.e., products that have been "dumped") in the United States. 19 U.S.C. § 1673 (2000). Section 731 of the Act provides for the imposition of antidumping duties "in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." *Id.* The "normal value" is typically the price at which the subject merchandise is sold in the home market of the foreign exporter or producer whereas the "export price" or

"constructed export price" is the price at which the subject merchandise is sold in the United States. *See id.* §§ 1677a(a), 1677b(a)(1)(B)(i).

Before determining whether subject merchandise is being dumped, the U.S. Department of Commerce ("Commerce") makes certain adjustments to the normal value and the export price or constructed export price of the subject merchandise to make a "fair comparison" between the two. *See id* § 1677b(a). The statute specifies exactly which adjustments are to be made to achieve the required "fair comparison." *See id.*

Once Commerce has made the required adjustments, it must calculate a "dumping margin" for each individual product type and then aggregate the results of those calculations to determine an overall "weighted average dumping margin" for each exporter and producer that is investigated. *Id.* §§ 1673d(c)(1)(B)(i), 1677(35)(A), (B). Section 771(35) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id.* § 1677(35)(A). Moreover, Section 771(35) defines "weighted average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices of such exporter or producer." *Id.* § 1677(35)(B).

Pursuant to Commerce's longstanding interpretation of the statute, a "dumping margin" exists only when the normal value "exceeds" the export price or constructed export price by a positive value. Thus, if the export price or constructed export price is equal to or higher than the normal value, Commerce determines there is no, or zero, "dumping

margin" for such sales and nothing to include when summing the "aggregate dumping margins" that constitute the numerator in the calculation of the "weighted average dumping margin" under the statute. The denominator of this calculation includes all export and constructed export prices, including those where the comparison to normal value resulted in no, or zero, "dumping margin." This has the effect of lowering the "weighted average dumping margin" because it increases the denominator.

Commerce's methodology of treating non-dumped sales as having a zero "dumping margin" (*i.e.*, the so-called "zeroing" methodology) has been repeatedly upheld as reasonable by the U.S. Court of International Trade (the "CIT") and the U.S. Court of Appeals for the Federal Circuit. The CIT and the Federal Circuit have recognized that the use of zeroing in calculating a company's dumping margin produces more accurate results by combating the problem of masked dumping. *See Timken Co. v. United States*, 354 F.3d 1334, 1343 (Fed. Cir.), *cert. denied*, ___ U.S. ___,125 S. Ct. 412, 160 L. Ed. 2d 352 (2004) ("*Timken*"); *PAM, S.p.A. v. U.S. Dep't of Commerce*, 265 F. Supp. 2d 1362, 1371 (Ct. Int'l Trade 2003); *Serampore Industries Pvt. Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360-61 (Ct. Int'l Trade 1987). As the Federal Circuit determined in *Timken*, zeroing "legitimately combats the problem of masked dumping, wherein certain profitable sales serve to 'mask' sales at less than fair value." *Timken*, 354 F.3d at 1343.

II. Statutory Framework Relating to the Treatment of the Uruguay Round Agreements and World Trade Organization Dispute Settlement Decisions

In 1994, the United States became a signatory and party to the Uruguay Round Agreements and, as a result, a

Member of the WTO. The Uruguay Round Agreements, including the Anti-Dumping Agreement, are not self-executing, and they have been implemented in U.S. law by the Uruguay Round Agreements Act (the "URAA"). *See* 19 U.S.C. § 3501 *et seq.*

In the URAA, Congress established explicit rules for resolving conflicts between U.S. law and the Uruguay Round Agreements. Specifically, Section 102(a) of the URAA clearly and unequivocally states that "{n}o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." *Id.* § 3512(a)(1). Section 102(a) further provides that "{n}othing in this Act shall be construed . . . to limit any authority conferred under any law of the United States . . . unless specifically provided for in this Act." *Id.* § 3512(a)(2).

Congress also included detailed rules in the URAA specifying how, if at all, the United States would respond to adverse decisions issued by WTO panels or the Appellate Body under the WTO Dispute Settlement Understanding. Section 123(g)(1) of the URAA expressly provides that where a WTO panel or the Appellate Body finds that a regulation or practice of an agency such as Commerce is inconsistent with one of the Uruguay Round Agreements, "that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until" every one of six separate actions are taken. *Id.* § 3533(g)(1). These actions include consultations among Congress, the United States Trade Representative ("USTR"), and the agency in question, consultations with the relevant private sector advisory committees, submission of a report to the appropriate congressional committees, and provision of

notice and an opportunity to comment on the proposed modification to the public. *Id.*

If a WTO panel or the Appellate Body finds that Commerce's determination in a particular case is inconsistent with one of the Uruguay Round Agreements, Section 129(b) of the URAA provides that USTR shall consult with Commerce and the appropriate congressional committees on the matter. *Id.* § 3538(b)(1). After such consultations, USTR may request Commerce to issue a determination to implement the WTO panel or Appellate Body report. *Id.* § 3538(b)(2). Before this determination may be implemented, USTR must consult again with Commerce and the appropriate congressional committees. *Id.* § 3538(b)(3). Thereafter, USTR "may" direct Commerce to implement its new determination "in whole or in part." *Id.* § 3538(b)(4).

The URAA specifically recognizes, in accordance with the WTO's Dispute Settlement Understanding, that the United States may choose to implement or not to implement the recommendations made in a panel or Appellate Body report. *See id.* § 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation") (emphasis added); *id.* § 3538(b)(4) (providing that after consultation with Commerce and the appropriate congressional committees, USTR "may" direct implementation of the recommendations contained in a report "in whole or in part"). Likewise, the Statement of Administrative Action (the "SAA") approved by Congress in conjunction with the URAA[1] explicitly states

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[1] Congress has specifically directed that the URAA is to be interpreted and applied in accordance with the SAA. Indeed, by statute, Congress directed that the SAA must be regarded as "an authoritative expression

that WTO panels and the Appellate Body "will not have any power to change U.S. law or order such a change" and that panel and Appellate Body decisions have "no binding effect." Statement of Administrative Action Accompanying the Uruguay Round Agreements Act ("SAA") at 659, 1032, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4042, 4318. As the SAA states, "{o}nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Id.* at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042 (emphasis added).

III. Administrative Proceedings Before Commerce

Commerce initiated the antidumping investigation of certain hot-rolled carbon steel flat products from the Netherlands that is the subject of this litigation on December 4, 2000. *See Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, et al.*, 65 Fed. Reg. 77568, 77578 (Dep't Commerce Dec. 12, 2000) (initiation). Corus is the sole producer of hot-rolled steel in the Netherlands and, therefore, was the sole company investigated by Commerce. *See Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed. Reg. 22146 (Dep't Commerce May 3, 2001) (prelim. determ.).

Prior to Commerce's final determination in the investigation, Corus filed a case brief challenging Commerce's use of zeroing to calculate the company's weighted average dumping margin. In the issues and decision memorandum adopted as part of its final

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by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

determination, Commerce rejected Corus' argument, determining that zeroing was required by U.S. law. Pet. App. 66a. Commerce determined that Section 771(35)(A) and (B) of the Act "direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales." *Id.* at 67a. Commerce further determined that "{a}t no stage in this process is the amount by which export price or constructed export price exceeds normal value on non-dumped sales permitted to cancel out the dumping margins found on other sales." *Id.*

Commerce also relied on the URAA and the SAA in concluding that the requirements of U.S. law "take precedence over any potentially conflicting obligations under the Uruguay Round Agreements." *Id.* at 68a. Finally, Commerce declined to show any deference to the decisions issued by the WTO panel and Appellate Body on zeroing in *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("*EC - Bed Linen*").

IV. Proceedings on Appeal

The CIT upheld Commerce's margin calculation methodology in its entirety. While the CIT disagreed with Commerce that the statute requires zeroing, it found that Commerce's use of zeroing was based on a reasonable interpretation of the statute. Pet. App. 24a, 30a. In so doing, the CIT stated:

> After all, zeroing is not new. Congress was presumably aware of the practice when it enacted the URAA. Congress could have

> prohibited zeroing if it so chose. Instead, Congress enacted a statute that, at least, arguably encourages zeroing by referring only to dumping margins where the U.S. price exceeds {normal value}.

Id. at 30a (citations omitted).

The CIT further found that the WTO decisions issued in *EC - Bed Linen* "cannot be the basis for striking Commerce's methodology." *Id.* at 29a. It determined that the WTO Anti-Dumping Agreement was "ambiguous" as to whether zeroing was permitted and that WTO decisions are not binding on Commerce or the U.S. courts or a proper basis for Commerce to change its procedures. Given the ambiguity of the Anti-Dumping Agreement and the reasonableness of Commerce's interpretation of the statute, the CIT concluded that it should defer to Commerce's interpretation. *Id.* at 29a-30a.

The U.S. Court of Appeals for the Federal Circuit affirmed. *Id.* at 1a-10a. Specifically, the Federal Circuit relied on its decision in *Timken* in again upholding Commerce's use of zeroing as a reasonable and permissible interpretation of the statute. *Id.* at 6a. In *Timken*, the Federal Circuit had recognized that it was "a close question" as to whether the U.S. statute required zeroing, but held that, "at a minimum," zeroing was a permissible construction of the statute. 354 F.3d at 1341-42.

As it had in *Timken*, the Federal Circuit also considered and rejected Corus' argument in the instant case that Commerce's use of zeroing violated the "fair comparison" requirement of Article 2.4.2 of the WTO Anti-Dumping Agreement. Based on its decision in *Timken*, the

Federal Circuit held that Corus' reliance on the Anti-Dumping Agreement was misplaced because the U.S. statute's "fair comparison" language and explicit scheme for calculating normal value governed. Pet. App. 7a-8a.

Finally, the Federal Circuit rejected Corus' reliance on the WTO Appellate Body's decisions in *EC - Bed Linen*, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products From Japan*,[2] and *United States - Final Dumping Determination on Softwood Lumber from Canada* ("*Softwood Lumber*").[3] The Federal Circuit held that such decisions have no binding effect under U.S. law and are owed no deference. In so doing, the Federal Circuit rejected Corus' argument under *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ("*Charming Betsy*") that Commerce's use of zeroing must be overturned in light of these WTO decisions to ensure compliance with the United States' international obligations. As the Court determined,

> {n}either the {the General Agreement on Tariffs and Trade (the "GATT")} nor any enabling international agreement outlining compliance therewith (e.g., the {Anti-Dumping Agreement}) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress. . . . Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm

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[2] WT/DS244/AB/R (Dec. 15, 2003).

[3] WT/DS264/AB/R (Aug. 11, 2004).

> of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation. . . .

Pet. App. 8a-9a (citing Sections 123 and 129 of the URAA). The Court also refused to overturn Commerce's use of zeroing because of the foreign policy implications of its determination and the need for the political branches of the government to resolve this issue. *Id.* at 9a-10a.

After the Federal Circuit issued its decision, Corus submitted a petition for rehearing and rehearing en banc and advised the Court of Commerce's implementation of the WTO Appellate Body's decision in *Softwood Lumber* pursuant to Section 129 of the URAA during the course of the Court's consideration of that petition. Nevertheless, the Federal Circuit rejected the petition and thereby once again upheld Commerce's use of zeroing on May 18, 2005. *Id.* at 61a-62a.

REASONS FOR DENYING THE PETITION

The Federal Circuit properly held that Commerce's use of zeroing in the calculation of Corus' aggregate dumping margin in the investigation at issue here represented a reasonable interpretation of the U.S. antidumping statute. The decision of the Federal Circuit does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is unwarranted and Corus' petition for a writ of certiorari should be denied.

I. Corus' Allegation of a Conflict Between the Federal Circuit's Decision and the Decision of a NAFTA Binational Panel Is Totally Devoid of Merit

Corus contends that the Court should grant certiorari to determine whether Commerce's reasonable interpretation of a U.S. statute must be overturned because it purportedly conflicts with a later decision issued by a NAFTA Binational Panel and the Binational Panel's application of *Charming Betsy*. As demonstrated below, neither the conflict alleged by Corus nor *Charming Betsy* warrant review by this Court.

A. There Is No Conflict Between the Decision Issued by the Federal Circuit and that of the NAFTA Binational Panel that Could Possibly Warrant Review by this Court

Corus argues that there is a "square conflict" between the decision issued by the Federal Circuit in the instant case and the decision issued by a NAFTA Binational Panel in an appeal of the antidumping investigation of softwood lumber from Canada and that this conflict alone warrants review by this Court. Pet. 2, 15, 17, 20. Indeed, Corus contends that "{t}he fact that the Federal Circuit has affirmed an agency interpretation that has been rejected by the only other body with authority to review that interpretation is itself a sufficient reason to justify review of the decision below." *Id.* at 3. Not only is this not a sufficient reason to justify review by this Court, either on its own or in combination with any other factor, Corus' contention is simply absurd.

The NAFTA Binational Panel decision upon which Corus relies was issued in an appeal of the antidumping investigation of softwood lumber from Canada approximately five months after the Federal Circuit's original

decision in the instant case and just under a month after the Federal Circuit's denial of Corus' petition for rehearing and rehearing en banc. Pet. App. 96a. In its decision, the NAFTA Binational Panel considered the effect of the WTO Appellate Body's report in *Softwood Lumber* in which the Appellate Body found against the use of zeroing in the very same antidumping investigation that was the subject of the NAFTA proceeding. *Id.* at 97a. While certainly aware of the decision issued by the Federal Circuit in the instant case in which the Federal Circuit rejected any reliance on the WTO Appellate Body's report in *Softwood Lumber*, the NAFTA Binational Panel proceeded to disregard it. *Id.* at 105a-110a. Instead, the Binational Panel relied on the completion of the implementation process for the Appellate Body's adverse report under Section 129 of the URAA and *Charming Betsy* in holding Commerce's use of zeroing in that case to be inconsistent with the international obligations of the United States. *Id.* at 109a, 116a, 120a. The completion of the Section 129 implementation process included the final decision by the political branches to actually implement the Appellate Body's report in that particular case.

Corus' contention that an alleged conflict between the Federal Circuit's decision in the instant case and the NAFTA Binational Panel's decision in the softwood lumber case warrants review by this Court is devoid of merit. Specifically, Corus' contention must be rejected for two overriding reasons.

First, Corus' argument baselessly equates a NAFTA Binational Panel with the Federal Circuit. Pet. 3, 20. In so doing, Corus flatly disregards and, in fact, fails even to mention the clear provisions of U.S. law and the NAFTA itself as well as case law establishing that Binational Panels

are inferior, subsidiary bodies to the Federal Circuit and are bound by Federal Circuit decisions. NAFTA Article 1904 states with respect to Binational Panel review that

> {a}n involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

NAFTA Art. 1904(2) (emphasis added).

Pursuant to NAFTA Article 1904, NAFTA Binational Panels reviewing antidumping and countervailing duty determinations issued by Commerce have consistently recognized that they are bound by decisions issued by the Federal Circuit. *See, e.g., Alloy Magnesium from Canada*, NAFTA Binational Panel, USA-CDA-2003-1904-02 (Sept. 9, 2005) at 19; *Gray Portland Cement and Clinker from Mexico*, NAFTA Binational Panel, USA-97-1904-02 (Dec. 4, 1998) ("*Mexican Cement*") at 5; *Oil Country Tubular Goods from Mexico*, USA-95-1904-04 (July 31, 1996) at 47 n.175. As the Panel stated in *Mexican Cement*, "Binational panels sitting in the United States are bound by decisions of

the CAFC, and will normally give great weight to precedents issued by the CIT . . . ." *Mexican Cement* at 5 (emphasis added). The NAFTA Binational Panel in the softwood lumber from Canada case was bound by the decision issued by the Federal Circuit in the instant case with respect to the effect of any adverse WTO reports on Commerce's use of zeroing. Accordingly, to the extent that there is any conflict between the decisions issued by the Binational Panel and the Federal Circuit on this issue, it simply shows that the Binational Panel acted in an *ultra vires* fashion in complete disregard of its legal obligations.

Additionally, NAFTA Binational Panels are not only bound by Federal Circuit decisions, but Congress has expressly established that the decisions issued by Binational Panels have no binding effect under U.S. law. 19 U.S.C. § 1516a(b)(3). In accordance with this statutory directive, the CIT has recognized with respect to a NAFTA Binational Panel decision that "{t}he Court by statute is not bound by the final decision and is not required to consider the final decision." *Cinsa, S.A. de C.V. v. United States*, 966 F. Supp. 1230, 1240 (Ct. Int'l Trade 1997). Once again, this shows the inferior, subsidiary position held by NAFTA Binational Panels and that no conflict between a Federal Circuit decision and a Binational Panel decision could possibly warrant this Court's review.

Second, even assuming, *arguendo*, that such a conflict could warrant this Court's review, there simply is no conflict between the NAFTA Binational Panel's decision in the softwood lumber from Canada case and the Federal Circuit's decision in the instant case. Throughout its decision, the NAFTA Binational Panel made clear that it was relying on the fact that the WTO Appellate Body's report in *Softwood Lumber* faulted the use of zeroing in the same

antidumping investigation that was at issue before the Binational Panel and that Commerce had completed the Section 129 process to implement the Appellate Body's report in that very case. Pet. App. 109a ("In *Softwood Lumber*, the Section 123/Section 129 process has run its course."); *id.* at 117a ("{T}he WTO *Softwood Lumber* Decision involves the use of zeroing by the United States in this very investigation and establishes its inconsistency with Article 2.4.2 of the Antidumping Agreement.") (emphasis added); *id.* at 120a ("The {WTO Dispute Settlement Body} decision in *Softwood Lumber* establishes with authority that the resort to zeroing in this investigation is not permitted by the Antidumping Agreement. . . . As such, the application of zeroing by the Department in this investigation conflicts with an international legal obligation of the United States.") (emphasis added).

In fact, the NAFTA Binational Panel explicitly stated that "{w}hen U.S. response to an adverse DSB ruling is under consideration or contest, it would be an intrusion on the decisional authority that Sections 123 and 129 accord to the USTR (in consultation with relevant congressional committees) for a court or a NAFTA Chapter 19 binational panel to find an agency measure unlawful under *Charming Betsy*." *Id.* at 106a. Thus, the Binational Panel clearly recognized that it was addressing a situation that was different and distinguishable from that addressed by the Federal Circuit in the instant case, and there is no conflict between the two decisions that could justify this Court's review.

Corus argues that the outcomes in the softwood lumber from Canada case and the instant case have turned entirely on the "happenstance" or "fortuity" of the forum involved. Pet. 3, 20. To the contrary, the outcomes in the

two cases have turned on one or both of the following two factors: (i) the NAFTA Binational Panel in the softwood lumber case issuing an *ultra vires* decision in complete disregard of its legal obligations and/or (ii) the fact that the Binational Panel was relying on Commerce's implementation of the WTO Appellate Body's adverse decision, including the political branches' final decision to actually implement the Appellate Body's ruling, with respect to the very same case. In either event, there is no basis for review by this Court.

B. The Federal Circuit Properly Upheld Commerce's Determination and Rejected the WTO Decisions Relied Upon by Corus

Corus argues that even beyond the alleged conflict between the Federal Circuit's decision in the instant case and the NAFTA Binational Panel's decision in the softwood lumber case, "{t}he underlying issue of federal law is also an exceedingly important one." Pet. 21. Specifically, Corus asserts that this Court should grant certiorari and overturn Commerce's use of zeroing under *Charming Betsy* on the ground that it is inconsistent with the United States' international obligations. *See id.* at 21-22. Once again, Corus' arguments provide no basis for review by this Court.

Under *Charming Betsy*, U.S. law is to be interpreted, where possible, in a manner that is consistent with U.S. international obligations. *Charming Betsy*, 6 U.S. (2 Cranch) 64; *Timken*, 354 F.3d at 1343. According to Corus, the WTO Appellate Body "has now conclusively ruled that the Department's practice of zeroing negative dumping margins in investigations violates" the "fair comparison" requirement of Article 2.4 of the WTO Anti-Dumping Agreement and the requirement to give full consideration to all comparable export sales in Article 2.4.2 of that Agreement. Pet. 21

(emphasis added). Corus contends that in light of the Appellate Body's ruling in this regard in *Softwood Lumber*, it was error for the Federal Circuit to uphold the use of zeroing in the instant case. Id.

However, in enacting the URAA and adopting the SAA, Congress clearly and unequivocally provided for U.S. law to prevail over any inconsistent provisions of the Uruguay Round Agreements and any obligations established thereunder. In particular, Section 102(a) of the URAA expressly provides that "{n}o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. § 3512(a)(1). Moreover, Section 102(a) provides that "{n}othing in this Act shall be construed . . . to limit any authority conferred under any law of the United States . . . unless specifically provided for in this Act." *Id.* § 3512(a)(2). In enacting these provisions, Congress clearly understood that there might be conflicts between U.S. law and the Uruguay Round Agreements and specifically provided for U.S. law to take precedence in those situations.

Furthermore, the SAA expressly provides that WTO panel and Appellate Body reports "will not have any power to change U.S. law or order such a change." SAA at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042. Such reports also have "no binding effect" under U.S. law. Id. at 1032, *reprinted in* 1994 U.S.C.C.A.N. at 4318. Thus, according to the SAA, an adverse WTO decision finding a U.S. law, regulation, or practice to be inconsistent with the provisions of one of the Uruguay Round Agreements cannot require a change in that law, regulation, or practice.

Based on the foregoing, *Charming Betsy* does not and cannot require that Commerce's use of zeroing be overturned due to its alleged inconsistency with Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.[4] Any such alleged inconsistency must be resolved in favor of the provisions of U.S. law allowing for the use of zeroing.

In any event, Corus is flatly wrong in asserting that the Appellate Body "conclusively ruled" in *Softwood Lumber* that Commerce's "practice" of zeroing negative dumping margins in investigations is inconsistent with the Anti-Dumping Agreement. The Appellate Body's decision in *Softwood Lumber* did not involve a challenge to Commerce's zeroing practice "as such" (*i.e.*, in general), but only "as applied" in that particular case. *Softwood Lumber* at para. 19.[5] Thus, by its own terms, the Appellate Body's decision in *Softwood Lumber* pertains only to the particular facts in

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[4] Contrary to Corus' contentions, the Appellate Body did not rule in *Softwood Lumber* that Commerce's use of zeroing was inconsistent with the "fair comparison" requirement in Article 2.4 of the Anti-Dumping Agreement. Its decision was based solely on Article 2.4.2 of the Anti-Dumping Agreement. *Softwood Lumber* at para. 117, Pet. App. 135a. To the extent that Corus is relying on the Appellate Body's decision in *EC - Bed Linen* with respect to Article 2.4, that decision did not involve the United States or its zeroing methodology and is, therefore, inapplicable. In addition, Section 773(a) of the Act contains its own "fair comparison" requirement and specifies exactly which adjustments are to be made to normal value and U.S. price to achieve the requisite "fair comparison." *See* 19 U.S.C. § 1677b(a). This provision of U.S. law takes precedence over Article 2.4 of the Anti-Dumping Agreement.

[5] In the WTO dispute settlement system, claims that are "as applied" involve challenges based on the "specific set of facts" in a particular case. They are distinguished from "as such" claims which challenge a WTO Member's practice in general in all cases. *See United States - Sunset Reviews of Antidumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (Nov. 29, 2004) at para. 6 and para. 6 n.22.

that case and not to Commerce's zeroing practice in general. In other words, it does not, in any way, pertain to Corus or any other case and there is no basis to apply it to overturn the use of zeroing in those cases.

Even in the event that a decision is adopted by the WTO that finds Commerce's zeroing practice to be inconsistent with the Anti-Dumping Agreement "as such" or "as applied" to Corus, that decision would have to be implemented in the United States, if at all, pursuant to the elaborate statutory scheme established by Sections 123 and 129 of the URAA.[6] With respect to an "as such" challenge to the practice of zeroing in general, each one of the six steps required by Section 123(g)(1) would have to be taken. 19 U.S.C. § 3533(g)(1). With respect to a challenge to zeroing "as applied" to Corus, Section 129(b) would require extensive consultations throughout the process among Congress, USTR, and Commerce as well as the issuance of a new determination by Commerce and proceedings relating to the consideration of that new determination. *Id.* § 3538(b) Significantly, the Executive Branch and/or Congress could simply decide, at any point during the implementation process under Sections 123 and 129, not to implement an

[6] A WTO panel formed to consider Commerce's zeroing practice both as such and as applied in a number of cases involving the European Communities, including the investigation at issue here, issued its decision finding Commerce's use of zeroing to be inconsistent with Article 2.4.2 of the Anti-Dumping Agreement on October 31, 2005. *See United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (Oct. 31, 2005). The panel's decision may be appealed to the WTO Appellate Body within 60 days of its issuance. Even if an adverse decision is ultimately adopted by the WTO in this matter, that decision would still have to be implemented in the United States pursuant to the detailed implementation scheme discussed above. Moreover, the United States may choose not to implement that decision at all.

adverse WTO decision at all. *See id.* §§ 3533(f)(3), 3538(b)(4); SAA at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042. As the SAA expressly recognizes, only the Executive Branch and Congress can decide "whether to implement a WTO panel recommendation and, if so, how to implement it." SAA at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042 (emphasis added).

Accordingly, as the Federal Circuit correctly determined, there is no basis for the courts to take any action with respect to Commerce's use of zeroing in the instant case. If this or another U.S. court were to overturn Commerce's use of zeroing based on *Charming Betsy*, it would thwart Congress' entire statutory scheme for the treatment of the Uruguay Round Agreements and WTO dispute settlement decisions. It would usurp the role of the political branches to determine whether and how to implement WTO decisions, would effectively eliminate policy options that are currently available with respect to Corus and others, and would compromise the United States' position in the ongoing litigation involving this issue at the WTO. Corus' petition for a writ of certiorari should be rejected on this basis as well.

II. There is No Conflict Among the Circuits Over the Proper Application of *Charming Betsy*

Corus next argues that the Federal Circuit's decision below conflicts with the decisions of other circuits over the proper role of *Charming Betsy* in cases involving deference to agency interpretations of ambiguous statutes under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). Pet. 22-23. In addition, Corus makes a number of baseless assertions regarding the significance of this alleged conflict. *See id.* at

25-26. Each of Corus' assertions in this regard is without merit.

A. The Federal Circuit's Decision Is Consistent with that of Other Circuits

Contrary to Corus' assertion, the Federal Circuit's decision in the instant case does not conflict with the decisions of any other circuit regarding the role of *Charming Betsy* in cases involving *Chevron* deference. In fact, despite alleging a purportedly "broader doctrinal conflict" over the proper role of *Charming Betsy* created by the Federal Circuit's decision, Corus cites only a single case - *George E. Warren Corp. v. U.S. Environmental Protection Agency*, 159 F.3d 616 (D.C. Cir. 1998) ("*George E. Warren Corp.*") - as evidence of this conflict. As established below, even the one case cited by Corus presents no conflict with the Federal Circuit's decision in this case.

In *George E. Warren Corp.*, an importer of gasoline challenged amended regulations issued by the Environmental Protection Agency (the "EPA") pursuant to the Clean Air Act. *Id.* at 620. Among other things, the plaintiff challenged the EPA's consideration of an adverse WTO decision in formulating its amended regulations. *Id.* at 623. The D.C. Circuit rejected the plaintiff's claim, holding that nothing in the applicable statute indicated that "Congress intended to preclude the EPA from considering the effects a proposed rule might have upon the . . . treaty obligations of the United States." *Id.* As a result, the Court upheld the EPA's exercise of its discretion in considering the adverse WTO decision as a reasonable interpretation of an ambiguous statute under *Chevron*. *Id.* at 623-24. In other words, the D.C. Circuit applied *Charming Betsy* to permit an agency to consider a WTO decision where the agency determined that such

consideration was appropriate. The Court did not require the agency to comply with or implement an adverse WTO decision. In this manner, the D.C. Circuit applied *Charming Betsy* to reinforce, rather than trump, *Chevron* deference to a reasonable agency interpretation of an ambiguous statute.

The Federal Circuit's decision in the instant case is entirely consistent with *George E. Warren Corp.* Despite Corus' contentions to the contrary, the Federal Circuit's decision did not in any way "deprive{} the Department of discretion to interpret the statute in a manner that does not violate U.S. treaty obligations." Pet. 24. In particular, in addressing the factors to be considered under the fair comparison requirement of the U.S. statute, the Federal Circuit did not even suggest that Commerce was somehow precluded from considering other factors in reaching its decision. Rather, the Federal Circuit simply declined to overturn Commerce's otherwise reasonable interpretation of the statute and thereby force Commerce to implement the WTO Appellate Body's adverse decisions on zeroing based on *Charming Betsy*. *See* Pet. App. 7a-10a. Accordingly, Corus' claims of a conflict between the D.C. Circuit's decision in *George E. Warren Corp.* and the Federal Circuit's decision here have no basis in fact.

Indeed, the consistency between the two circuits' application of *Charming Betsy* is further demonstrated in two other decisions issued by the Federal Circuit. Specifically, in *Federal Mogul Corp. v. United States* ("*Federal Mogul*"), the statute being considered by the Federal Circuit "presented Commerce with a choice between methodologies for calculating dumping margins" and the Court upheld Commerce's selection of the option that was consistent with U.S. international obligations. 63 F.3d 1572, 1581 (Fed. Cir. 1995). Similarly, in *Luigi Bormioli Corp. v. United States*,

the Federal Circuit upheld an interpretive ruling of the U.S. Customs Service that was promulgated to implement a decision of a GATT committee. 304 F.3d 1362, 1368-69 (Fed. Cir. 2002). Significantly, in each of these cases, the Federal Circuit was not acting to mandate implementation of an adverse international decision contrary to the wishes of the Executive Branch and in violation of a designated statutory scheme for implementation. Instead, consistent with the D.C. Circuit's decision in *George E. Warren Corp.*, the Federal Circuit applied *Charming Betsy* in tandem with *Chevron* to accord deference to an agency's exercise of discretion to consider an international decision.

In fact, Corus has not cited a single case in which a court of appeals has reversed an otherwise reasonable agency interpretation of an ambiguous statute under *Charming Betsy* and thereby used *Charming Betsy* to force implementation of an adverse international decision. *See* Pet. 22-24. There is a very simple reason for this - there is no such case.

B. Corus' Discussion Regarding the Importance of the Alleged Conflict Among the Circuits on *Charming Betsy* Is Without Basis

Corus further contends that the purported conflict among the circuits over the proper application of *Charming Betsy* in cases involving *Chevron* deference "is a recurring and indisputably important one" justifying review by this Court. Pet. 24-25. However, Corus' discussion regarding the importance of this issue is simply baseless.

Corus first asserts that the "economic significance" of this issue "is itself enormous." *Id.* at 25. There are two fundamental problems with this assertion, however.

First, Corus has not even attempted to show how this factor is relevant to the issue of whether this case is appropriate for review by the Court. If an issue's "economic significance" were sufficient to warrant review, this Court's docket would be flooded with a multitude of cases qualifying on this basis alone.

Second, Corus' contentions regarding the "economic significance" of this case are based purely on assumptions and estimates that either lack support or, even worse, are demonstrably wrong. *See id.* Among other things, Corus essentially attributes the entire amount of the antidumping and countervailing duties estimated to be collected by the United States over the next 5 to 10 years to the use of zeroing. *See id.* This is simply absurd. Indeed, zeroing is just one of the innumerable factors that enter into the calculation of antidumping duties that are assessed and collected in the United States. It may or may not have an impact on the amount of such duties. Moreover, zeroing is not even used in and, therefore, has no bearing on the calculation of countervailing duties. Accordingly, Corus' assertions regarding the "economic significance" of this case do not comport with the facts and certainly do not warrant this Court's review.

Corus' other argument regarding the significance of this case is that international trade is not the only area in which courts must address the interplay of *Charming Betsy* and *Chevron* and, therefore, this issue is likely to arise in a number of different contexts in the future. *Id.* at 26. In support of this argument, Corus cites three cases in which it claims this issue arose outside the international trade context, including *George E. Warren Corp.* in the D.C. Circuit. *Id.* However, the cases in question either do not address this

issue at all or do not conflict, in any way, with the Federal Circuit's decision in the instant case.[7] In other words, the cases cited by Corus do not offer any basis to justify this Court's review.

III. The Federal Circuit Properly Deferred to Commerce's Determination Based on the Statutory Scheme for Implementation of WTO Decisions and Based on the Foreign Policy Implications of Commerce's Determination

Finally, Corus argues that this Court should review and reverse the Federal Circuit's decision in the instant case because it deprives Corus of its right to judicial review and

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[7] Corus' contention that this issue arose in *Mississippi Poultry Ass'n, Inc. v. Madigan* ("*Mississippi Poultry*") is flatly wrong. Pet. 26. In that case, the 5th Circuit held that the language of the statute at issue was unambiguous, and, therefore, the Court did not confer deference to the agency's interpretation of the statute under *Chevron*. *Mississippi Poultry*, 992 F.2d 1359, 1368 (5th Cir. 1993). The Court also specifically rejected the application of *Charming Betsy*. *Id.* at 1367. Of the remaining two cases cited by Corus, neither conflicts with the Federal Circuit's decision here. As established above, there is no conflict between the Federal Circuit's decision and the decision of the D.C. Circuit in *George E. Warren Corp.* Additionally, there is no conflict between the Federal Circuit's decision and that of the 9th Circuit in *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003) ("*Ali*"), the other case cited by Corus. In *Ali*, the 9th Circuit upheld the district court's decision that the agency's interpretation of the statute was not entitled to deference because it was inconsistent with the agency's policy and regulations. *Id.* at 885. While the 9th Circuit also upheld the district court's reference to international law in reaching its decision, the 9th Circuit found that this reference was "merely as further support" for the construction of the statute that the district court had already adopted and that the international law principles in question were also supported by U.S. domestic law. *Id.* at 885-86. Clearly, there is no conflict between the 9th Circuit's decision in *Ali* and the Federal Circuit's decision in the instant case, and Corus has alleged none.

denigrates or dilutes Congress' authority as the primary voice of the United States on matters of foreign commerce. *See id.* at 27-30. Once again, there simply is no basis for either of these arguments.

Corus contends as an initial matter that the Federal Circuit's decision deprives it of its right to judicial review of Commerce's action. *Id.* at 27-28. Specifically, Corus argues that "{b}y deeming the foreign policy implications of antidumping orders to fall within the exclusive province of the political branches, . . . the Federal Circuit improperly conferred unfettered discretion on the Department to implement an ambiguous provision of the Tariff Act in whatever manner the agency sees fit." *Id.* at 28. As purported support for this contention, Corus cites this Court's decisions in *Traynor v. Turnage*, 485 U.S. 535, 542 (1988) ("*Traynor*"), and *Bowen v. Michigan Acad. Of Family Physicians*, 476 U.S. 667, 671 (1986) ("*Bowen*"). *Id.* at 27-28. However, neither of the cited cases provides any support for Corus' argument.

Indeed, in both of the cases in question, this Court simply considered and rejected arguments by the government that a statute completely barred judicial review of the challenged administrative actions. *Traynor*, 485 U.S. at 541-42, 545; *Bowen*, 476 U.S. at 669-73. The Federal Circuit's decision here did not, in any way, bar judicial review of Commerce's actions in calculating Corus' dumping margin. To the contrary, Corus still had the benefit of full judicial review of whether Commerce's actions satisfied the requirements of U.S. law and represented a reasonable interpretation of the antidumping statute. The Federal Circuit simply held that the decisions issued by the WTO Appellate Body on zeroing were owed no deference in

resolving this issue and could not serve as a basis for overturning Commerce's determination. *Pet. App.* 9a-10a.

Corus' argument regarding the dilution of Congress' authority as the primary voice of the United States on matters of foreign commerce is also without merit. In making this argument, Corus ignores the fact that it is the Executive Branch, rather than Congress, that is the "sole organ" of the United States in matters of foreign affairs. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). Indeed, the courts have steadfastly avoided taking any action that would impinge on or disturb the Executive Branch's plenary and exclusive power in this area. *See id.*; *SNR Roulements v. United States*, 341 F. Supp. 2d 1334, 1343-44 (Ct. Int'l Trade 2004) ("*SNR Roulements*").

This principle has been repeatedly applied in matters involving the treatment of adverse decisions issued by the WTO. For example, in *SNR Roulements*, the CIT upheld Commerce's use of a methodology that had been found by the WTO Appellate Body to be inconsistent with the Anti-Dumping Agreement, expressing that it was "mindful of the prerogative of the Executive Branch - most importantly, the Office of the U.S. Trade Representative - in dealing with the WTO in its diplomatic and policymaking roles." 341 F. Supp. 2d at 1343-44. Moreover, the courts have consistently accorded substantial deference to Commerce's interpretation of the antidumping statutes based on "the foreign policy repercussions of a dumping determination." *Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983); *see also Federal Mogul*, 63 F.3d at 1582 (same); *Daewoo Electronics Co., Ltd. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993) (same); *Melamine Chems., Inc. v. United States*, 732 F.2d 924, 930 (Fed. Cir. 1984) (same).

But the Executive Branch's authority here is based on more than just its general power in matters of foreign affairs. As the Federal Circuit correctly recognized in its decision below, Congress has created a statutory framework specifically authorizing the Executive Branch, in consultation with Congress, to determine whether to implement WTO decisions and, if so, the extent of implementation. Pet App. 9a-10a. Specifically, by virtue of Sections 123 and 129 of the URAA, Congress has created a detailed statutory scheme pursuant to which WTO decisions do not have an automatic and binding effect on U.S. law and do not trump determinations of the Executive Branch in defining U.S. policy and practices. Under that statutory scheme, the Executive Branch, acting through USTR and in consultation with Congress, must expressly decide whether and, if so, how to implement WTO decisions. *See* 19 U.S.C. §§ 3533(f), 3538(b).

Corus treats the steps required by Sections 123 and 129 of the URAA for the implementation of an adverse WTO decision as a perfunctory, pro forma exercise. Pet. 28-29. However, this argument ignores the critical nature of each of the actions and decisions necessitated by the statutory scheme and the fact that the Executive Branch and/or Congress may decide at any time under that scheme not to implement a WTO decision at all. *See* 19 U.S.C. §§ 3533(f)(3), 3538(b)(4); SAA at 659, *reprinted in* 1994 U.S.C.C.A.N. at 4042. Were this Court to require Commerce's determination here to comply with the WTO Appellate Body's decisions on zeroing, it would, in effect, implement such decisions in contravention of the statutory scheme established under Sections 123 and 129 and would eliminate the various policy options available to the Executive Branch for responding to adverse WTO decisions.

Contrary to Corus' assertions, the Federal Circuit's decision in the instant case does not denigrate or dilute Congress' authority. Rather, it fulfills Congress' mandate and gives effect to Congress' role both by enforcing the statutory scheme established by Congress for the implementation of WTO decisions and by recognizing the need for Congressional involvement through that scheme. In fact, it is Corus, not the Federal Circuit, that would divest the political branches of their voice and would improperly exalt the supremacy of the courts in matters of foreign commerce by eviscerating the statutory scheme that Congress has established and allowing for judicial implementation of WTO rulings. There is no conceivable basis for Corus' argument.

CONCLUSION

For all of the reasons set forth above, Corus' petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

19 U.S.C. § 1516a. Judicial review in countervailing duty and antidumping duty proceedings

* * * *

(b) Standards of review

* * * *

(3) Effect of decisions by NAFTA or United States-Canada binational panels

In making a decision in any action brought under subsection (a) of this section, a court of the United States is not bound by, but may take into consideration, a final decision of a binational panel or extraordinary challenge committee convened pursuant to article 1904 of the NAFTA or of the Agreement.

* * * *

19 U.S.C. § 1673d. Final determinations

* * * *

(c) Effect of final determinations

(1) Effect of affirmative determination by the administering authority

If the determination of the administering authority under subsection (a) of this section is affirmative, then --

* * * *

(B)(i) the administering authority shall --

(I) determine the estimated weighted average dumping margin for each exporter and producer individually investigated, and

(II) determine, in accordance with paragraph (5), the estimated all-others rate for all exporters and producers not individually investigated, and

(ii) the administering authority shall order the posting of a cash deposit,

bond, or other security, as the administering authority deems appropriate, for each entry of the subject merchandise in an amount based on the estimated weighted average dumping margin or the estimated all-others rate, whichever is applicable, and

(C) in cases where the preliminary determination by the administering authority under section 1673b(b) of this title was negative, the administering authority shall order the suspension of liquidation under section 1673b(d)(2) of this title.

* * * *

19 U.S.C. § 1677a. Export price and constructed export price

(a) Export price

The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section.

* * * *

19 U.S.C. § 3512. Relationship of agreements to United States law and State law

(a) Relationship of agreements to United States law

(1) United States law to prevail in conflict

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed --

(A) to amend or modify any law of the United States, including any law relating to --

(i) the protection of human, animal, or plant life or health,

(ii) the protection of the environment, or

(iii) worker safety, or

(B) to limit any authority conferred under any law of the United States, including section 2411 of this title,

unless specifically provided for in this Act.

* * * *

(d) Statement of administrative action

The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

19 U.S.C. § 3533. Dispute settlement panels and procedures

* * * *

(f) Actions upon circulation of reports

Promptly after the circulation of a report of a panel or of the Appellate Body to WTO members in a proceeding described in subsection (d) of this section, the Trade Representative shall --

(1) notify the appropriate congressional committees of the report;

(2) in the case of a report of a panel, consult with the appropriate congressional committees concerning the nature of any appeal that may be taken of the report; and

(3) if the report is adverse to the United States, consult with the appropriate congressional committees concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation.

* * * *

THE URUGUAY ROUND AGREEMENTS ACT
STATEMENT OF ADMINISTRATIVE ACTION

* * * *

[Page 659]

AGREEMENT ESTABLISHING
THE WORLD TRADE ORGANIZATION

A. SUMMARY OF PROVISIONS

The Agreement Establishing the World Trade Organization (WTO Agreement) creates a permanent forum for member governments to address issues affecting their multilateral trade relations as well as to supervise the implementation of the trade agreements negotiated in the Uruguay Round. The new World Trade Organization (WTO) will operate in much the same manner as the General Agreement on Tariffs and Trade, which it will replace, while overseeing a wider variety of trade agreements and benefiting from a number of improved decision-making procedures.

1. U.S. Sovereignty

U.S. sovereignty is fully protected under the WTO Agreement. The WTO will continue the longstanding GATT practice of making decisions by consensus. The last policy decision made by

vote under the GATT -- other than approving a waiver or a country's accession to the GATT -- was in 1959. However, should a vote be taken on a matter in the WTO, the improved procedures written into the WTO Agreement will ensure that there can be no change in U.S. substantive rights and obligations without the agreement of the United States.

The WTO will have no power to change U.S. law. If there is a conflict between U.S. law and any of the Uruguay Round agreements, section 102(a) of the implementing bill makes clear that U.S. law will take precedence:

> "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."

Moreover, as explained in greater detail in this Statement in connection with the Dispute Settlement Understanding, WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.

* * * *

North American Free Trade Agreement

Part Seven: Administrative and Institutional Provisions

Chapter Nineteen: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters

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Article 1904: Review of Final Antidumping and Countervailing Duty Determinations

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2. An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. Solely for the purposes of the panel

review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.

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